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From Berne to Beijing: A Critical Perspective

*Remarks by Professor David Lange**

ABSTRACT

Remarking on the Beijing Treaty on Audiovisual Performances at the Vanderbilt Journal of Entertainment & Technology Law's Symposium, From Berne to Beijing, Professor Lange expressed general misgivings about exercising the Treaty Power in ways that alter the nature of US copyright law and impinge on other constitutional rights. This edited version of those Remarks explains Professor Lange's preference for legislation grounded squarely in the traditional jurisprudence of the Copyright Clause, the First Amendment, and the public domain, and his preference for contracting around established expectations rather than reworking default rules through treaties. It continues by exploring the particular costs associated with the Beijing Treaty's expansion of moral rights into US copyright law. Those expanded rights, viewed in light of previous legislative and judicial expansions of traditional US copyright principles, threaten to erode certain portions of the public domain and the exercise of First Amendment rights. Recognizing that additional rights for some result in a loss of rights for others, these Remarks invite critical reflection on the costs and benefits of the Beijing Treaty, "copyright restoration," and other well-intentioned alterations to the status quo.

I thank the editors of the Journal for their kind invitation to speak today.

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And I congratulate Justin Hughes, SAG/AFTRA, and the MPAA on their success in Beijing, and especially on the signing of the Beijing Treaty last summer.¹ I am sympathetic to the struggles faced by actors and performers everywhere, and nowhere more so than in the audiovisual arts.

In truth, though, I do have some misgivings about treaties of this sort—that is to say, treaties that alter the nature of US copyright law generally, but more especially those that elevate the importance of moral rights by giving them a more prominent place in US law than they have customarily had.²

I can say why in a few sentences: I generally prefer contracts to laws of universal application.³ I think moral rights that presume to limit new authors' expression by restricting otherwise permissible use of works under copyright or in the public domain—for example under doctrines of fair use or parody—are troublesome in a constitutional setting like ours. When it comes to protecting rights in creative expression, I prefer legislation still grounded squarely in the traditional jurisprudence of the Copyright Clause, the First Amendment, and the public domain, as against a more substantial *de facto* role for the Treaty Power and the Commerce Clause.⁴ I think the US experience with multilateral treaties since Berne has made it clear that we may sacrifice some of what is exceptional and valuable in our own culture in order to harmonize our laws with others in the pursuit of global commerce.⁵ And I resist casting aside settled expectations in any industry for the sake of change, however appealing that change may seem to be. I am not adamant as to any of these points, save for the question of creative expression. I merely share with Edmund Burke an inclination to think that change very often does not prove to be quite as appealing when the smoke clears and the costs are counted.

Whether these reservations may prove to be warranted in the case of the Beijing Treaty remains to be seen. Of course there are bound

1. Beijing Treaty on Audiovisual Performances, World Intellectual Property Organization, June 24, 2012, AVP/DC/20 [hereinafter Beijing Treaty], available at http://www.wipo.int/treaties/en/text.jsp?file_id=295837.

2. See, e.g., *id.* art. 5 (granting performers rights of attribution and integrity, even following a transfer in copyright ownership, among other things).

3. See, e.g., Matthew Rushton, *Global Justice at a Crossroads*, 63 INT'L B. NEWS 14 (2009) ("The very notion of universal application of laws . . . is 'fascinating to everyone, a pipedream to many, an aspiration to many and a nightmare for others.'" (quoting Professor David Crane, former chief prosecutor for the Special Court for Sierra Leone)).

4. See generally DAVID LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT (2009).

5. See, e.g., *Golan v. Holder*, 132 S. Ct. 873, 893 (2012); see also David L. Lange, Risa J. Weaver & Shiveh Roxana Reed, *Golan v. Holder: Copyright in the Image of the First Amendment*, 11 J. MARSHALL REV. INTELL. PROP. L. 83 (2011).

to be questions: Is the definition of a “performer” sensible in a medium in which any day now someone is sure to film World War II with the original cast?⁶ Should the term of protection really reach back fifty years?⁷ Will it eventually reach back further?⁸ And so on. But for the moment—again with one exception—the treaty seems benign enough on its face.

That exception is in its concern for moral rights which, as I say, may survive or stand apart from copyright in ways that can impede other authors’ use of an actor’s work. It is most troubling once the work is (or otherwise would be) in the public domain.⁹ As in the case of Article 6bis of the Berne Convention, concerns of this sort are understandable.¹⁰ But at least in my own opinion they are potentially at odds, in a conceptual sense, with the Copyright Clause’s “limited times” provision, with the even more important (and antecedent) claims the public domain should bring to bear on every work of expression, and, most importantly—in a constitutional sense—with the First Amendment.¹¹

And here, I suppose, is just where the thrust of my own remarks necessarily begins. For nearly everything I have just presupposed by implication about the Copyright Clause, the First Amendment, and the public domain has been set at sixes and sevens, perhaps beginning with the Uruguay Round of the GATT in 1986,¹² but surely with our adherence to the Berne Convention in 1989,¹³ and culminating in two cases decided within the past decade—each of them a muddled reflection of our effort to secure a wider place among the copyright nations of the world.¹⁴

Our experience has been that sometimes a multilateral treaty can carry us too far. That can happen because the treaty itself (or some part of it) is a bad idea, or at least inconsistent with the traditions of our culture. It might also happen because the idea is badly

6. Beijing Treaty, *supra* note 1, art. 2.

7. *Id.* art. 14; *see generally* Eldred v. Ashcroft, 537 U.S. 186 (2003).

8. *See generally* Golan, 132 S. Ct. 873.

9. *See generally* Lange et al., *supra* note 5.

10. Berne Convention for the Protection of Literary and Artistic Works art. 6bis, September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on Sept. 28, 1979, 1161 U.N.T.S. 3 [hereinafter Berne Convention], available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

11. *See* LANGE & POWELL, *supra* note 4, at ix.

12. Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (1994).

13. Berne Convention, *supra* note 10.

14. *See generally* Golan v. Holder, 132 S. Ct. 873, 878 (2012); Eldred v. Ashcroft, 537 U.S. 186, 194 (2003).

implemented in the course of enabling legislation. And when something like that presents itself, precedents can follow that are ill-judged and even destructive.¹⁵

Two pieces of legislation prompted by our adherence to treaties illustrate the first problem, which arises particularly when the Treaty Power and the Commerce Clause take center stage, casting a shadow over the Copyright Clause.¹⁶ One is the so-called Sonny Bono Copyright Term Extension Act of 1998 (SBCTEA), which added twenty years to the terms of copyrighted works in the United States.¹⁷ The other is the so-called Copyright Restoration Act (the “URAA”), which conferred US copyright protection upon millions of foreign works that had fallen into the public domain in this country—sometimes for reasons grounded in a failure to comply with no-longer-applicable formal prerequisites to US copyright, and sometimes because the proprietors of the foreign works simply did not seek or even want US protection.¹⁸ The Supreme Court upheld both Acts against objections grounded in the Copyright Clause, the First Amendment, and the public domain.¹⁹

In *Eldred v. Ashcroft*, Justice Ginsburg, writing for a majority, approved the SBCTEA.²⁰ From the majority’s analysis, the Copyright Clause offers few constraints against Congressional discretion as to term limits.²¹ As for the First Amendment, copyright contains its own doctrinal safeguards against encroachments upon freedom of expression; as long as copyright’s “traditional contours” (in her usage of the phrase, the idea-expression dichotomy, and fair use) remain in place, heightened First Amendment scrutiny is not required.²²

Meanwhile, last year’s decision in *Golan v. Holder* upheld the URAA.²³ The loss to the public domain seemed harsher and more stark in *Golan* than it had in *Eldred*. The URAA meant (among other things) that some persons, who had relied on the public domain status of earlier

15. See generally Lange et al., *supra* note 5.

16. See U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. II, § 8, cl. 8.

17. Pub. L. No. 105-298, § 102, 112 Stat. 3287 (1998) (codified as amended at 17 U.S.C. § 301 (2012)).

18. Uruguay Round Agreements Act, Pub. L. 103-465, § 514, 108 Stat. 4809 (1994).

19. See *Golan*, 132 S. Ct. at 878; *Eldred*, 537 U.S. at 192–94.

20. *Eldred*, 537 U.S. at 194.

21. See *id.* at 218 (“For the several reasons stated, we find no Copyright Clause impediment to the CTEA’s extension of existing copyrights.”); see also *id.* at 223 (Stevens, J., dissenting).

22. *Id.* at 221 (“But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.” (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987))).

23. *Golan*, 132 S. Ct. at 875, 894. In Justice Ginsburg’s usage of the phrase, such “traditional contours” consist of the idea-expression dichotomy and fair use. *Id.* at 890.

works in creating derivative works of their own, now faced either the unexpected payment of royalties for their continuing use of the restored works, or else the forfeiture of their right to exploit the derivative works they had created.²⁴

In *Golan*, once again, Justice Ginsburg wrote the opinion for the majority.²⁵ In some part, as she herself insisted, her opinion in *Golan* merely reiterated what she had written in *Eldred*.²⁶ “Concerning the First Amendment,” she wrote, “we recognized [in *Eldred*] that some restriction on expression is the inherent and intended effect of every grant of copyright.”²⁷ Assuming copyright’s traditional safeguards, and assuming content neutrality (as the parties in *Golan*, like the parties in *Eldred*, had conceded), the prospect of a particular role for the First Amendment is effectively precluded.²⁸

Likewise, her opinion in *Golan* echoes what she had said in *Eldred* about the Copyright Clause. Justice Ginsburg’s opinion reads that Clause to confer what is now essentially unreviewable discretion upon Congress to deal with copyright as it thinks best.²⁹ Absent some “misbehavior” (her word, not mine), the Clause has no significant role to play in reviewing that discretion.³⁰

In one respect, however, her opinion in *Golan* goes much further than anything she had seemed to say in *Eldred*. For most copyright practitioners and scholars, the public domain has been thought to be essentially inviolate.³¹ Indeed, in *Eldred* it appeared that members of the Court who addressed the subject at all during oral argument also assumed that Congress was not free to withdraw works from the public domain, and that it was important in a constitutional sense that the SBCTEA did not propose to do so.³²

24. See *id.* at 878 (“Petitioners include orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works § 514 removed from the public domain.”).

25. *Id.* at 877.

26. See generally *Eldred*, 537 U.S. 186.

27. *Golan*, 132 S. Ct. at 889.

28. Lange et al., *supra* note 5, at 122.

29. U.S. CONST. art. 1, § 8, cl. 8; *Golan*, 132 S. Ct. at 888 (“[W]e explained, the Clause ‘empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.’” (quoting *Eldred*, 537 U.S. at 222)).

30. See *Golan*, 132 S. Ct. at 873 (“But as in *Eldred*, such hypothetical misbehavior is far afield from this case.”); Lange et al., *supra* note 5.

31. See Tyler T. Ochoa, *Is the Copyright Public Domain Irrevocable? An Introduction to Golan v. Holder*, 64 VAND. L. REV. EN BANC 123, 124 (2011) (“Traditionally, the copyright public domain has been considered irrevocable.”).

32. See Transcript of Oral Argument at *17, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), available at <http://www.aaronsw.com/2002/eldredTranscript> (“it does take a lot of things out of the public domain that one would think that someone in Congress would want to think hard about”); Lange et al., *supra* note 5, at 98.

But *Golan* makes it appear that these assumptions have been unwarranted. In a narrow sense, to be sure, Ginsburg's opinion merely upheld the URAA, where at least the works are of foreign origin and have never enjoyed a full term of copyright protection in the United States.³³ All such works are now free to enjoy the protection they would have secured if they had behaved from the beginning as US copyright proprietors were obliged to do in order to secure protection.³⁴

From another perspective, however, the URAA confers benefits upon millions of works whose US counterparts remain, at least for the time being, in the public domain.³⁵ In this sense, the URAA privileges foreign works above works with US origins. But if that is so, how long can we expect that distinction to hold effect? Could Congress withdraw US works from the public domain on grounds identical to those in the URAA—or for other reasons now within the reach of Congressional discretion? Could Congress even imaginably withdraw works that have enjoyed a full term of protection?

To the surprise of many who have read Ginsburg's opinion in *Golan*, even the last extreme proposition does not seem entirely far-fetched now. Though she does not quite say so in explicit terms, she is at pains not to preclude the idea altogether.³⁶ Withdrawals obviously calculated to avoid the limited times provision of the Copyright Clause might conceivably amount to impermissible "misbehavior" (again, her word, not mine); but, something less than that would not necessarily cross any forbidden lines at all.³⁷ It would not matter that the effect of such withdrawals might not serve as an incentive to the creation of new works; Justice Ginsburg's opinion elevates distribution and other exploitation of works to a status on par with the creation of new works as worthy goals for Congress to pursue through the Copyright Clause.³⁸ Ultimately, the question of wholesale restoration would raise questions for Congress to resolve. But the Clause presumably would not forbid

33. *Golan*, 132 S. Ct. at 878; 17 U.S.C. § 514 (2012).

34. *See Golan*, 132 S. Ct. at 878 ("Works encompassed by § 514 are granted the protection they would have enjoyed had the United States maintained copyright relations with the author's country or removed formalities incompatible with Berne.")

35. *Id.* ("As a consequence of the barriers to U.S. copyright protection prior to the enactment of § 514, foreign works "restored" to protection by the measure had entered the public domain in this country.")

36. *See generally Golan*, 132 S. Ct. 873.

37. *Id.* at 875 ("But as in *Eldred*, such hypothetical misbehavior is far afield from this case.")

38. *Id.* at 876 ("The creation of new works, however, is not the sole way Congress may promote 'Science,' *i.e.*, knowledge and learning.")

it.³⁹ The First Amendment would remain irrelevant.⁴⁰ The public domain itself may simply be without “constitutional significance.”⁴¹

The effect of these two cases, but particularly *Golan*, is to recognize the broadest Congressional latitude with respect to copyright legislation ever conceded by the Court. The breadth of that concession is remarkable in an absolute sense, and nothing less than stunning to those who have supposed (it now appears erroneously) that the Constitution must have some role to play in constraining Congress in this field.

I would respond now by saying that the Constitution does remain relevant, but not in the sense that we might have expected. Thanks to the siren call of global commerce and multilateral treaties, the constitutional emphasis has shifted. We may go on saying that we care about creative expression, and in some newly constricted sense, no doubt we do. But thanks to Justice Ginsburg we are obliged to care considerably more about the politics of global commerce under the more distant auspices of the Treaty Power⁴² and the Commerce Clause.⁴³

Every effort in the direction of multilateral harmony results in at least some adjustment in the marginal costs of creative expression. That is not necessarily bad. But neither is it necessarily a win-win situation. Add twenty years to the term of copyright and someone downstream pays or loses. Restore copyright in millions of foreign works, and again someone pays or loses. Add performance rights in the recording or film and television industries, retroactive across some fifty years, and yet again someone must ante up what someone else will now pocket. But these consequences, and others like them, are relatively manageable concerns, even in my own assessment. A treaty merely picks up where a contract leaves off (or is muscled aside). The smaller economic effects may remain debatable at some abstract level. It seems unnecessary to worry about the Beijing Treaty in these terms just now, however, especially if the film industry itself approves.

What I do care about myself is freedom of expression. And there really is no question that in consequence of each of the first two

39. U.S. CONST. art. 1, § 8, cl. 8; *Golan*, 132 S. Ct. at 888 (“[W]e explained, the Clause ‘empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.’” (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003))).

40. See generally *Golan*, 132 S. Ct. at 889–94.

41. *Id.* at 888 n.26 (“The dissent also suggests, more tentatively, that at least where copyright legislation extends protection to works previously in the public domain, Congress must counterbalance that restriction with new incentives to create. Even assuming the public domain were a category of constitutional significance, we would not understand ‘the Progress of Science’ to have this contingent meaning.” (citations omitted)).

42. U.S. CONST. art. II, § 2, cl. 2.

43. U.S. CONST. art. I, § 8, cl. 3.

real-life scenarios I have just described there will be some expression that simply will never see the light of day. Some author's estate will hold on to the rights in their decedent's work for sentimental reasons entirely understandable in themselves, but with the result that the works will have lost their value altogether at the end of the extra twenty years.⁴⁴ The eponymous petitioner in *Golan* wanted to use the works of Shostakovich in order to introduce inner-city schoolchildren to classical music; but he lacked the money to clear those rights, and so his plans languished.⁴⁵ I suppose it is too soon to say how the performers' rights envisioned in the Beijing Treaty will play out against concerns like these, but for the time being I will assume the best.

But these worries are small when considered against the possibilities that we now face after *Golan*. Imagine a surge in the direction of "copyright restoration" for works long thought to be free from copyright protection. This is the latest threat to the public domain, and it is far more serious than any that has gone before. It has followed in no small part from our preoccupation with global commerce and harmonization; from our commitment to ill-judged and unnecessary legislation, urged on mainly by the copyright industries; and with the support in turn of a Court that gives no evidence of understanding the issues in terms that take us much beyond the realms of commerce, and Congressional discretion unfettered by anything but politics at large.

When it comes to wholesale withdrawals of works from the public domain, I cannot think we would have envisioned anything quite as obviously destructive to freedom of expression at the outset of the Uruguay Round of the General Agreement on Tariffs and Trade in 1986. I think it would still have seemed unlikely in 1989, when the United States adhered to the Berne Convention. I am not sure it would have been imaginable prior to the ratification of the TRIPS Accords in Marrakech in 1994, when the WTO stepped into the picture. But at some point along the way we lost our bearings. We no longer know who we are—or rather, who we were. The implications for the future of creativity and expression are in no sense reassuring.

But you will ask: where is the particular risk for the motion picture industry in all of this? Let me respond to this entirely legitimate challenge in two brief points.

First, in the initial stages of creative development and pre-production for any given film, the industry depends upon access to

44. Consider the late John D. MacDonald's "Travis McGee" series, among others. See LANGE & POWELL, *supra* note 4, at 94–95.

45. See Lange et al., *supra* note 5, at 88; see also Rich Bailey, *Lawrence Golan Speaks About Golan v. Holder and His Fight to Protect the Public Domain*, TECHDIRT (Oct. 7, 2011, 8:00 AM), <http://www.techdirt.com/articles/20111006/12220616236/lawrence-golan-speaks-about-golan-v-holder-his-fight-to-protect-public-domain.shtml>.

the public domain. Sequels and remakes: each may look to the public domain from time to time; but they are not at the center of the looming problem for the industry. It is in such adaptations as *Les Misérables*⁴⁶ or *Anna Karenina*,⁴⁷ for example, that we can see the dilemma most clearly. Restore the underlying works in films like these to current copyright protection, and you may well have removed one of the year's leading Academy Award-nominated pictures from the realm of existence altogether.

Imagine negotiating with the heirs of Victor Hugo for film rights in *Les Misérables*.⁴⁸ Early negotiations leading toward *Les Misérables* might preclude the development of the film altogether; this would be a loss to the public, and a disappointment to the would-be producers, though still relatively inexpensive. But (taking the parameters of the URAA as a model) it would approach the dimensions of a catastrophe should restoration arise after the film has been completed and is in release, especially prior to recoupment. Films do recoup, studio accountants to the contrary notwithstanding; but it can take a while. Cash flow cycles are long in the film business, and the fully allocated profit margins are often thin, even when a single film succeeds on its own. So the prospect of destructive intervening rights arising from unanticipated restoration after release and distribution is not far-fetched.

Does the Beijing Treaty threaten the film industry in similar fashion? Not on the face of it; at least I do not think so. But once its prospective benefits are firmly fixed in place, will we not need to consider all those actors trapped in limbo in films fixed more than fifty years ago? Should we not consider restoring rights to them as well? How about Margaret O'Brien? Surely, she deserves restored performance rights for her role as Tootie in *Meet Me in Saint Louis* in 1944.⁴⁹

I do not see how claims like hers can go unraised. I do not see how they can go unanswered either, except as yet another exercise in

46. LES MISÉRABLES (Universal Pictures 2012).

47. ANNA KARENINA (Universal Pictures 2012).

48. That is not at all far-fetched. His heirs actually attempted to assert rights in France, though they were rebuffed under French law. Kim Willsher, *Heir of Victor Hugo Fails to Stop Les Mis II*, THE GUARDIAN (Jan. 30, 2007), <http://www.theguardian.com/world/2007/jan/31/books.france>.

49. Remember her in the Halloween scene, just after she's thrown a bag of flour in the face of old Mr. Geezer down the street? Her eyes widen at the unexpected acclaim of all the older children gathered around the bonfire who dared her on, never believing for a moment that Tootie—little Tootie!—would take up their challenge. In all of film's rich history, it stands as one of childhood's supreme moments of self-recognition as she comes to terms with what this accomplishment says about her personality and character: "I'm the most horrible!" MEET ME IN ST. LOUIS (Metro-Goldwyn-Mayer 1944).

politics. This is where our investments in treaties and commerce have brought us, guided along the way by a Supreme Court to which both creativity and freedom of expression are little more than mere abstractions. And do bear this in mind as well: the Beijing Treaty is not just about money and credit; it is also about an understanding of moral rights that confers upon every performer the power to limit modifications in their performances that “are objectively prejudicial to the performer’s reputation in a substantial way.”⁵⁰ I don’t know exactly what that means; but if it adds anything at all, then it adds rights that are not there now. Additional rights for some result in a loss of rights for others.

Ah, well. Perhaps I take too dark a view of what we are gathered here to celebrate. Perhaps the Beijing Treaty will prove to be a victory for actors and studios alike. I hope very much that it will. If it does it will be the answer to a long-held dream.

That is a pretty thought. As those of us who love movies and the film business know, a dream is a wish your heart makes.⁵¹ And yet that brings to mind another fable, with which I will conclude my remarks at last. I expect you will all remember it. It is a story in which a wise Mother Bear says to her son, who has been pursuing his own dreams, a bit incautiously: “Be careful what you wish for, Little Bear. For you may get it.”

50. Beijing Treaty, *supra* note 2, art. 5 n.5.

51. *A Dream Is a Wish Your Heart Makes*, on WALT DISNEY’S CINDERELLA - ORIGINAL SOUNDTRACK (Walt Disney Records 2005).